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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAYVON LAMAR SMITH,

Defendant and Appellant.

B284766

(Los Angeles County
Super. Ct. No. BA449253)

APPEAL from the judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed with directions.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Dayvon Lamar Smith of intimidating a witness (Pen. Code, § 136.1, subd. (a)(1) & (2)),¹ also finding that he acted maliciously with use, or threatened use, of force (§ 136.1, subd. (c)(1)) and that he committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(4)). Smith admitted a prior serious felony conviction constituted a strike (§§ 667, subds. (a)(1), (b)-(i), 1170.12). The trial court sentenced Smith to 14 years to life, plus five years for the prior conviction.

On appeal, Smith contends the evidence is insufficient to support his conviction, and the trial court abused its discretion by refusing to strike his prior conviction strike and the gang enhancement. We disagree because substantial evidence supports his conviction and the court's decision was well within its discretion. Smith also claims, and the People agree, he is entitled to 56 days of conduct credit. The People further request correction of the abstract of judgment in certain respects discussed *post*. In a supplemental letter brief, Smith claims the matter must be remanded to permit the trial court to exercise its discretion as to whether to strike his section 667, subdivision (a) enhancement, pursuant to section 1385, subdivision (a).

We affirm the judgment of conviction. However, we remand with directions to the trial court (1) to exercise its discretion as to whether to strike Smith's section 667, subdivision (a) enhancement, and (2) to award Smith his conduct credit. We also order correction of the abstract of judgment.

¹ Unless otherwise indicated, subsequent section references are to the Penal Code.

BACKGROUND

I. Prosecution

A. *Overview*

The People presented evidence at trial that a pimping victim (a 15-year-old female) and a prosecutor were sitting and talking in a courthouse hallway before the pimp's afternoon preliminary hearing. Someone took a photograph of the two. There was evidence that the pimp and Smith were members of the same gang, and that, after the victim's preliminary hearing testimony, Smith posted on his Facebook account the photograph and related comments disparaging the victim. The victim later saw the posting, and an issue at trial was whether Smith did the posting and thereby committed the crime of intimidating a witness.

B. *The Present Offense and Smith's Arrest*

T.R. was the 15-year-old victim in the above-described pimping case that the People filed against Reginald Washington. Washington, a prominent member of the Bacc Street Crips, had the moniker "Baby Ticc." Los Angeles County Deputy District Attorney Lowrie Mendoza prosecuted Washington in the pimping case.

On August 2, 2016, Deputy District Attorney Mendoza went to Division 30 to determine where Washington's preliminary hearing would occur. T.R. was in the courtroom. Mendoza did not see Smith in the courthouse (and, therefore, did not see Smith take the photograph of T.R. discussed *post*). The judge in Division 30 scheduled the preliminary hearing for that afternoon in Division 110.

Mendoza asked T.R. to speak with her, and the two sat on a bench outside Division 30. Signs in the hallways announced the prohibition against taking photographs there. Nevertheless, someone took a photograph of Mendoza and T.R. sitting on the bench outside the courtroom.

Los Angeles Police Officer Vanessa Rios arrived at Division 30. She saw T.R., who appeared calm. She also saw Washington's mother and Shikima McKinney² sitting together outside Division 30.

T.R. reluctantly attended Washington's August 2, 2016 preliminary hearing. Mendoza testified that the hearing began "about maybe 2:00 p.m." T.R. was an uncooperative witness, and her testimony was evasive.³

After T.R.'s testimony, she and Officer Rios met in the courtroom vestibule. T.R. held her cellphone. She was shaking and upset. She told Officer Rios, "Look at this. Please take me home." Officer Rios observed a Facebook post on T.R.'s cellphone. The post, from "Sowe Beeh" (later identified as Smith), consisted of a photograph and the comment "#RteNow yah lookn [emojis representing two pairs of eyes] at the bitch [emojis of three fingers pointed down at the photograph] dat tld on the homie Baby Ticc [three emojis of a thumb and forefinger making a

² The amended information in this case named McKinney as a codefendant. The court later severed her case from Smith's. McKinney is not a party to this appeal.

³ Mendoza testified that, during T.R.'s testimony, the bailiff escorted Jonathan Powell from the courtroom. Powell was upset. Officer Rios saw Powell leave the courtroom. Powell said, " 'this is bullshit.' "

circle, plus four rat emojis] #T[.]W[.] [four gunshot and three gun emojis] share my post.” T.W. was T.R.’s Facebook username.

Officer Rios and T.R. exited the vestibule. Crying, T.R. told Officer Rios that she feared for her life because the Bacc Street Crips knew where she lived and would kill her. A few days after the preliminary hearing, Officer Rios spoke with T.R. about relocating T.R. for her safety. However, after that conversation, he never spoke to her again and he was “totally unsuccessful in any attempt to relocate her[.]”

On August 12, 2016, Los Angeles Police Officer Manuel Mendieta saw Smith outside Smith’s residence at 861 East 118th Street. Officer Mendieta arrested him, searched the residence, and found a Plum cellphone. Smith told Officer Mendieta that Smith’s Facebook username was “Sowe Beeh.”

C. The Facebook and Cellphone Investigations

Los Angeles Police Officer Thorsten Timmermans conducted Facebook records investigations. He had conducted hundreds of investigations involving Facebook, Instagram, Twitter, and all social media. A Facebook user can access Facebook accounts via a device permitting Internet access, such as a cellphone equipped with a Facebook application.

A Facebook business record showed that at 2:01 p.m. on August 2, 2016, Sowe Beeh authored, and “ES Queen” received, a message that said, “I’m finna block tht bitch.” ES Queen replied, “[T.] something.” At 2:02 p.m., ES Queen wrote, “[T.W.]”

Facebook’s records also showed that on August 2, 2016, a device uploaded the previously mentioned photograph of T.R. to the Facebook account of Sowe Beeh. A Facebook tracking function identified the approximate location of the device, and the

approximate time, when the upload occurred. At 2:07 p.m. and 41 seconds, the device was at 116th Street and Wadsworth Avenue. At 2:07 p.m. and 55 seconds, the device uploaded the photograph. At 3:07 p.m., someone used the device to modify the photograph.

At 3:39 p.m., “Unfkorgettable Shyy Ladylocstah” commented, “She told on you too pointed you out and circled your pic.” About 20 seconds later, “Jondoe NumbaNine” made a comment not pertinent here.⁴ At 3:40 p.m., Sowe Beeh replied to the above 3:39 p.m. post, stating, “What you mean[?]” At 3:41 p.m., “Jondoe NumbaNine” responded, “Nigga she told on ticc, you and hammer.” At 3:42 p.m., “Unfkorgettable Shyy Ladylocstah” added, “today in court when they was asking her question didn’t u say he was tiny bear from bsc and he’s a pimp.” At 5:02 p.m., ES Queen told Sowe Beeh, “Take dat post down.”

Steven Ching, a surveillance specialist in the technical investigation division of the Los Angeles Police Department, extracted data from the Plum cellphone. Specifically, he obtained information from the Facebook Messenger application in the phone, to wit: at 3:37 p.m. on August 2, 2016, someone wrote to Sowe Beeh, “She [t]hought that ass was safe [knowing] nigaas be at court lurkin.” At 4:40 p.m., “Unfkorgettable Shyy Ladylocstah” wrote to Sowe Beeh, “#Fuck[T.W.]” At 6:02 p.m., ES Queen, using the Facebook Messenger application, wrote to Sowe Beeh. Between 6:19 p.m. and 6:20 p.m., someone sent to Sowe Beeh the following messages: “[s]tay yo ass out the way

⁴ Officer Rios investigated the Facebook account of a person named “Shy Lady Locc”; Officer Rios believed that person was McKinney. “Jondoe NumbaNine” was Powell’s Facebook username.

dayvon ong,” “[t]hey tagging the bitch all in your post,” “[d]elete that shit,” and “[s]he can screenshot.”

Officer Mendieta, a gang expert, testified concerning Bacc Street Crips. The Bacc Street Crips’s southern and eastern borders are 111th Place and Wadsworth Avenue, respectively. The gang’s primary criminal activities include pimping, human trafficking, assault with a deadly weapon, and gun possession. Its symbols included the letter B and the letters BSC. The gang also uses a symbol consisting of a lowercase B formed by a thumb and index finger touching, with “the other three [fingers] up in the air.” According to Officer Mendieta, “snitching” meant telling law enforcement personnel about someone committing crime. Gang members do not tolerate snitching, and those who have snitched may be beaten or killed. Gang members use social media for numerous reasons, including, in the present case, to notify other gang members that T.R. had “snitched” and the gang wanted members to commit acts of violence against her.

Officer Mendieta had previous contacts with Smith. Smith had admitted that he was a Bacc Street Crips member whose moniker was Tiny Bear. Smith resided at 118th Street and Wadsworth Avenue.⁵

Officer Mendieta indicated that the person who posted the photograph of T.R. on Facebook signaled disdain for T.R. The person had “hashtagged” T.R. and indicated that she had snitched on Washington. A “hashtag” is a pound sign followed by numbers or letters, signifying a searchable link. A person can

⁵ Officer Mendieta opined Powell was a Bacc Street Crips member; Powell had admitted this to the officer. Officer Mendieta knew McKinney; she had tattoos consistent with her being a Bacc Street Crips member.

also “tag” someone in a photograph. If someone tags a Facebook user’s name, the user receives notice of the tagging. Tagging gives people an opportunity to join a discussion.

In response to the prosecutor’s hypothetical question based on the evidence, Officer Mendieta testified as to how the post of a photograph and comments benefited the Bacc Street Crips. The posts notify other gang members that a person has snitched and that they should commit acts of violence against the person. The violent acts punish past, and deter future, snitching. The post also benefits the person who made the post by demonstrating the person’s gang allegiance.

II. Defense

Smith testified that in 2015, he was convicted of selling a controlled substance. He committed that crime for the benefit of a gang. Smith claimed that in November 2015, after his release from jail, he left the Bacc Street Crips. He was leaving the gang when Washington, who allegedly was a pimp, joined.

Smith denied having anything to do with any Facebook posts. The Plum cellphone belonged to Smith. He denied possessing the phone on August 2, 2016. He nonetheless testified that he had used the phone that morning to call the mother of his child several times. He then spent the day with her. According to Smith, the phone remained at his house that day; his mother listened to music on it, and she would know who else in the house used his Facebook account on his phone. On one occasion, someone hacked his phone.

Smith acknowledged the Facebook account for Sowe Beeh was his account. The account contained numerous photographs and comments entered after November 2015 and related to the

Bacc Street Crips. Someone hacked Smith’s Facebook page so, on August 3, 2016, Smith tried to delete it.

During an August 30, 2016 recorded jail conversation between Smith and the mother of his child, the two discussed whether McKinney needed to “take a deal.” Smith stated that McKinney “need[s] to say she posted it. She need[s] to confuse the jury.” Smith also stated: “Nah, she didn’t take the picture. Say she did not take the picture. But she posted it on my phone[.]” Smith testified that McKinney was “ ‘Unforgettable Shy Lead Locc’ ” and a Bacc Street Crips member.

Mastin Hunter, a former Bacc Street Crips member and best friend of Smith, testified that about November 2015, he saw gang members expel Smith from the gang.

DISCUSSION

I. Sufficient Evidence Supports Smith’s Conviction

Smith claims (1) there was insufficient evidence identifying him as the person who posted T.R.’s photograph and who made the related comments in the post, and (2) there was insufficient evidence that the post was a malicious attempt to prevent or discourage T.R. from testifying. We reject these claims.

A. Standard of Review and Applicable Law

In analyzing whether the evidence is sufficient to support a conviction, “ ‘we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such

that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ ” the jury’s verdict.’ [Citation.]” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

Section 136.1, subdivision (a), provides that “any person who does any of the following is guilty of a public offense”: “(1) Knowingly and maliciously *prevent[ing] or dissuad[ing]* any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (2) Knowingly and maliciously *attempt[ing]* to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.” (Italics added.)

Section 136.1, subdivision (c)(1), provides: “Every person doing any of the acts described in subdivision (a) . . . knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony . . . : [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim” Smith does not

expressly dispute that if he was the person who posted the photograph and related comments, he did so “knowingly” within the meaning of section 136.1, subdivision (a); rather, he focuses primarily on whether the act was a “malicious[] attempt[] to prevent or dissuade” within the meaning of subdivision (a)(2).

For purposes of section 136.1, “ ‘Malice’ means an intent to vex, annoy, harm, or injure in any way another person, or to thwart or interfere in any manner with the orderly administration of justice.” (§ 136, subd. (1); see *People v. Wahidi* (2013) 222 Cal.App.4th 802, 807 (*Wahidi*).)

Section 136.1, subdivision (d), provides: “Every person attempting the commission of any act described in subdivisions (a) . . . and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was . . . in fact intimidated, shall be no defense against any prosecution under this section.” Section 136.1, subdivision (a)(2), “neither restricts the means a defendant selects to commit the offense, nor does it require that [a] defendant personally deliver the message to the witness. A threat need not actually deter or reach the witness because the offense is committed when the defendant makes the attempt to dissuade the witness.” (*People v. Foster* (2007) 155 Cal.App.4th 331, 335.)

“The crime of attempting to dissuade a witness from testifying is a specific intent crime. [Citation.] ‘Unless the defendant’s acts or statements are intended to affect or influence a potential witness’s or victim’s testimony or acts, no crime has been committed under this section.’ [Citation.] The circumstances in which the defendant’s statement is made, not just the statement itself, must be considered to determine whether the statement constitutes an attempt to dissuade a

witness from testifying. [Citation.] If the defendant's actions or statements are ambiguous, but reasonably may be interpreted as intending to achieve the future consequence of dissuading the witness from testifying, the offense has been committed. [Citation.]" (*Wahidi, supra*, 222 Cal.App.4th at p. 806.)

B. *Analysis*

As to the sufficiency of the identification evidence, there is no dispute that on August 2, 2016, someone posted the photograph of T.R. and related comments on Sowe Beeh's Facebook page. Smith told Officer Mendieta that his Facebook username was Sowe Beeh. Smith conceded during his testimony that the Sowe Beeh Facebook account belonged to him. Washington's preliminary hearing began sometime after 2:00 p.m. The Facebook account reflected that at about 2:01 p.m., Sowe Beeh and ES Queen had an exchange during which Sowe Beeh expressed disapproval of a female whom ES Queen identified as T.W. At 2:07 p.m., someone uploaded the photograph of T.R. and the comments to Sowe Beeh's Facebook account. ES Queen later told Smith to take it down; Smith expressed no confusion regarding what post ES Queen was referring to or why ES Queen told him to take it down.

Smith testified that on August 3, 2016, he attempted to delete his Facebook page; the jury reasonably could have concluded this action evidenced consciousness of guilt (see *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780) and was probative on the issue of the identity of the person posting the information on Sowe Beeh's Facebook page. The jury also could have reasonably rejected as self-serving Smith's explanation that he

tried to delete the page because someone hacked it. (See *People v. Windfield* (2016) 3 Cal.App.5th 739, 758.)

As Smith conceded during his testimony, the Plum cellphone belonged to him, and it contained a Facebook application. When, at 2:07 p.m. on August 2, 2016, someone uploaded the photograph, that Plum cellphone's location was 116th Street and Wadsworth Avenue. Smith lived at 118th Street and Wadsworth Avenue. After the posting of the photograph, other Facebook users sent messages to the cellphone referencing the photograph, including a message that told "dayvon" to stay out of the way.

Moreover, the evidence supported a reasonable inference that at about 3:40 p.m., Powell (Jondoe NumbaNine) indicated that during T.R.'s preliminary hearing testimony, she "told on ticc [Washington] . . . [and] *you [Smith]*." (Italics added.) Similarly, at 4:39 p.m., McKinney wrote to Sowe Beeh, " 'She told on *you too* pointed you out and circled your pic.' " The jury reasonably could have concluded that Powell and McKinney were saying that T.R., by her preliminary hearing testimony, accused Smith of being somehow involved in Washington's crime.

The jury also reasonably could have viewed Smith's failure to dispute T.R.'s accusation as an adoptive admission that T.R. had in fact identified him. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1188-1189; *People v. Preston* (1973) 9 Cal.3d 308, 313-315.) This in turn provided substantial evidence that Smith had a motive to commit the present offense.

There was also substantial evidence from the testimony of Officers Mendieta and Rios that Smith and Washington were Bacc Street Crips members. Coupled with Officer Mendieta's testimony to the effect that Smith committed the offense for the

benefit of the gang, these elements provided further evidence of a motive for Smith to commit the present offense and that he was the person who committed it. (See *People v. Gomez* (2018) 6 Cal.5th 243, 294.)

Further, the jury also reasonably could have disbelieved Smith's defense in light of his failure to call logically appropriate witnesses with information germane to his defense. This included his failure to call his mother who, according to Smith's self-serving testimony, used his cellphone the day in question to listen to music and supposedly knew who else in the home used the cellphone to access his Facebook account. Smith presented no evidence that any person other than himself used the Plum cellphone to post content to his Facebook account. (See *People v. Alaniz* (2017) 16 Cal.App.5th 1, 7;⁶ accord, *People v. Gomez, supra*, 6 Cal.5th at p. 299.)

In jail, Smith made statements to the mother of his child to the effect that McKinney needed to confuse the jury and say McKinney posted the photograph of T.R. on Smith's cellphone; the jury reasonably could have concluded these statements were evidence of consciousness of guilt, supporting Smith's conviction. (See *People v. Fritz* (2007) 153 Cal.App.4th 949, 959.) In sum, there was sufficient identification and access evidence to convince

⁶ *People v. Alaniz, supra*, 16 Cal.App.5th at p. 7, quoting *People v. Vargas* (1973) 9 Cal.3d 470, 475, noted, "[i]t is now well established that although *Griffin [v. California]* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] prohibits reference to a defendant's failure to take the stand in his own defense, that rule "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." ' ' "

a rational trier of fact, beyond a reasonable doubt, that Smith was the person who posted the photograph of T.R. and related comments on his Facebook account. (Cf. *People v. Penunuri*, *supra*, 5 Cal.5th at p. 142.)

As to the sufficiency of the evidence that Smith maliciously attempted to prevent or discourage T.R. from testifying, Smith argues that because the photograph and related comments were posted *after* T.R. reluctantly testified at Washington's preliminary hearing, there was insufficient evidence the post was a malicious attempt to prevent or discourage her from testifying at Washington's preliminary hearing. There is no need to decide the issue.

The evidence established that T.R. and Mendoza sat outside Division 30 and someone took a photograph of them. T.R. later testified at Washington's preliminary hearing in Division 110. There was also evidence that the T.R. photograph and related comments were posted after she testified at Washington's preliminary hearing: the post indicated T.R. was the person "dat *tld*" (*sic*; italics added) on Washington. The emails that "Unfkorgettable Shyy Ladylocstah," Sowe Beeh, and Jondoe NumbaNine exchanged from 3:39 p.m. to 3:42 p.m., included similar allegations that T.R. "told" on Washington and a reference to what happened "today in court." These emails considered together support a reasonable inference that the posting of the T.R. photograph and related comments occurred after she testified.

However, the controlling inquiry is whether Smith intended to achieve the prospective consequence of dissuading T.R. from testifying. (*People v. Foster*, *supra*, 155 Cal.App.4th at p. 335; see *Wahidi*, *supra*, 222 Cal.App.4th at p. 806.) As

discussed below, there was substantial evidence that Smith posted the photograph and related comments, intending to dissuade T.R. from testifying at Washington's *trial*.

The comments on the photograph referenced the "bitch" who had told on Washington. The comments contained emojis of rodents. The later comments, following T.R.'s other name, "[T.W.]," included gunshot emojis, gun emojis, and the statement, "share my post." The four gunshot emojis and three gun emojis were evidence Smith was seeking to encourage other viewers of his Facebook page to shoot T.R. His comments included three emojis, each representing a hand with the thumb and forefinger touching and the other fingers pointed up, representing the letter "b," a symbol of the Bacc Street Crips. The jury could have reasonably concluded from the photograph and comments that Smith intended to communicate that T.R. was a despised female who had told on Washington, and she was therefore a "rat" or snitch whom members of the gang should kill to assure she did not testify against Washington at his trial.

Additionally, Smith "hashtagged" T.R., notifying her of the post. This evidenced an intent that she see the photograph and comments and cower accordingly, i.e., by not testifying against Washington at his trial.

Smith's Facebook account and cellphone received posts stating that he should remove the photograph and related comments from his Facebook page. The jury could have reasonably concluded that those posts reflected concern the photograph and related comments were incriminating. Smith expressed no confusion about the removal requests and did not then dispute the photograph and comments were, in fact, incriminating. Thus, the jury could have reasonably concluded

that Smith's effort on or after August 3, 2016, to delete his Facebook page manifested consciousness of guilt. (See *People v. Hart* (1999) 20 Cal.4th 546, 620-621.)

The same is true of Smith's statements to the mother of his child that McKinney needed to confuse the jury and say she posted the photograph of T.R. Evidence of a defendant's attempts to have a third party fabricate evidence is evidence of consciousness of guilt. (*People v. Clark* (2016) 63 Cal.4th 522, 604-605 & fn. 60.) As indicated below, there was substantial evidence that the Facebook posts did, in fact, have the effect of dissuading T.R. from testifying at Washington's *trial*. T.R. testified, although reluctantly, at Washington's preliminary hearing. After that testimony, she saw the photograph of T.R. and its related comments, feared gang retaliation, and feared for her life. Officer Rios and T.R. discussed relocating T.R. for her safety; however, Officer Rios was subsequently unable to locate T.R.

Thus, there is substantial evidence that Smith, by posting the photograph of T.R. and the related comments, knowingly and maliciously prevented or dissuaded, and knowingly and maliciously attempted to prevent or dissuade, T.R., a witness and victim, "from attending or giving testimony at any *trial*" within the meaning of section 136.1, subdivision (a). (*Italics added.*) Additionally, substantial evidence supports that Smith's act was accompanied by an express or implied threat of force or violence upon a witness or victim for purposes of section 136.1, subdivision (c)(1). Further, substantial evidence establishes that Smith harbored "an intent to vex, annoy, harm, or injure" T.R. and an intent "to thwart or interfere . . . with the orderly administration of justice" within the meaning of section 136,

subdivision (1). (See *Wahidi, supra*, 222 Cal.App.4th at pp. 807, 809.)⁷ Accordingly, substantial evidence comprehensively supported Smith's conviction.

II. The Trial Court Properly Denied Smith's Motion To Strike His Prior and the Gang Enhancement

A. Background

The amended information alleged that Smith had a prior conviction for transporting or selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)), which was a serious felony (§ 667, subd. (a)(1)) and a strike (§§ 667, subds. (b)-(i), 1170.12).

According to the preconviction probation report prepared for a September 2016 hearing, Smith, born in February 1996, sustained convictions for trespassing and vehicle theft in 2007 and 2011, respectively. In September 2015, he suffered his felony conviction for transporting or selling a controlled substance; the trial court placed him on formal probation for 36 months. While on probation, he committed the current offense. The report also noted Smith was involved in gang activity with the Bacc Street Crips.

The report stated that Smith had a minimal arrest record and was suitable for community based supervision. The report alleged as aggravating circumstances that Smith's crime "involved great violence, great bodily harm, [a] threat of great

⁷ In light of our conclusion that there was sufficient evidence that Smith attempted to prevent, and prevented, T.R. from testifying at Washington's trial, there is no need to decide whether Smith attempted to prevent, or prevented, T.R. from testifying at Washington's preliminary hearing.

bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness”; the manner in which he carried out the crime indicated planning, sophistication, or professionalism; and he was on probation or parole when he committed the crime. There were no mitigating circumstances, and the aggravating circumstances warranted imposition of the “high-base term.” Nonetheless, the report concluded that while Smith’s current crime was very serious, it did “not appear to warrant a state prison sentence.” It recommended supervised probation for three years.

On January 26, 2017, after the jury reached its verdict in this case, Smith admitted that in September 2015 he had been “convicted of sale of a controlled substance, in violation of Health [and] Safety Code section 11352[, subdivision] (a) with a gang allegation enhancement pursuant to . . . section 186.22[, subdivision] (b), making that conviction a serious felony . . . as well as a strike”

After the court excused the jury, defense counsel informed the court that he intended to file a motion to strike the prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). On July 12, 2017, the People filed a sentencing memorandum requesting the court to sentence Smith

to prison for 19 years to life,⁸ unless the court decided to exercise its discretion under *Romero* and section 186.22, subdivision (g).⁹

On August 21, 2017, Smith filed a combined sentencing memorandum and motion to strike (1) his prior conviction under *Romero* and (2) the current gang enhancement under section 186.22, subdivision (g), and *People v. Fuentes* (2016) 1 Cal.5th 218. Smith requested a prison sentence of 12 years, consisting of (1) the high term of four years for the present offense, plus five years for the prior conviction and (2) a consecutive three-year term for violating probation in an independent case.

Smith emphasized that the prior conviction had occurred when he was 18 years old: the nonviolent offense of selling rock cocaine. Smith asserted that only his admission of the gang enhancement allegation in that case made that crime a strike, and the court in that case had sentenced him to time served.

Smith also noted as mitigating factors that Washington was 17 years old when he allegedly engaged in pimping as to T.R. Smith and McKinney were 20 years old when the current crime

⁸ The People listed as additional aggravating factors that T.R. was particularly vulnerable; Smith had threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, and illegally interfered with the judicial process; and Smith's adult convictions or juvenile adjudications were numerous or of increasing seriousness.

⁹ Section 186.22, subdivision (g), provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

occurred. Officer Rios's testimony did not indicate that anyone older than 21 years old was involved in this case. Additionally, the threat had been conveyed through social media, not personally.

Smith supported his motion with a report from Dr. Timothy Collister, a clinical psychologist. Dr. Collister indicated that, from childhood, Smith had been "exposed to several psychosocial stressors." By the time Smith was 18 years old, he had developed an antisocial personality disorder. Dr. Collister found it "abundantly clear that [Smith] has a severe chronic mental disorder" and recommended "intensive case management . . . to minimize risk of future criminal behavior." However, despite the severity of Smith's conduct, Dr. Collister found "a plethora of mitigating factors" and believed "[t]here is still a possibility of [Smith] being a productive, responsible citizen if given the opportunity."

At the August 23, 2017 sentencing hearing, the trial court confirmed that it had read Smith's sentencing memorandum. The court stated "that the sentence for the [section] 136.1[, subdivision (c)(1) conviction] with force and a gang allegation is life, with a minimum term of seven years. The strike would double that, and the serious felony conviction would add five years to that. So it would be a life term with a minimum of 19 years," as requested by the People.

The court noted defense counsel was "asking for something significantly different than that. You asked that I strike the gang allegation, and ultimately impose a term of I believe 19 years. So I'll hear from you on that." Defense counsel argued that given Smith's youth and Dr. Collister's report, a life sentence "would thwart the interest of justice." Counsel also argued a life

sentence would be catastrophic, because Smith was the father of young children. He also pointed out there was no allegation of personal contact between Smith and T.R.

The prosecutor noted that Smith was the sole source of information for the patient history underlying Dr. Collister's report. The prosecutor provided the court with additional posts on Smith's Facebook page, including a picture depicting someone slitting the throat of a uniformed officer. The prosecutor represented that the post preceded the current offense by about five weeks.

The trial court observed the above additional posts reflected Smith's immaturity and that, potentially, he was extremely dangerous. After further argument, the court opined the problem with saying the present offense involved merely a Facebook post was that "the intimidation and its exposure [were] far more significant" because the post was on the Internet, and people might have acted on the post.

The court also notified the parties that it was including in the court file documents it had received that morning. These were a school progress report indicating Smith had performed well in class, and a certificate pertaining to career, technical, education, anger management, and domestic violence programs.¹⁰ The court commented, "I am confident, the way things are right now, that Mr. Smith will not serve a life term in state prison, but I am going to impose the sentence currently prescribed by law." The court sentenced Smith to prison for 19

¹⁰ The court announced it would include these documents and Dr. Collister's report so they could be considered by parole authorities.

years to life. The court did not expressly rule on Smith's motion to strike the strike and gang enhancement.

B. *Analysis*

Smith claims the trial court abused its discretion by denying the motion. He argues, inter alia, the court erroneously believed imposition of the strike and gang enhancement was mandatory because the court stated it would "impose the sentence currently prescribed by law."

Pursuant to section 1385, subdivision (a), a trial court may strike a prior conviction for purposes of the three strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 158.) In deciding whether to strike a prior conviction, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.) We review the ruling for abuse of discretion. (*Id.* at p. 152.) We consider whether the trial court's ruling "fell outside the bounds of reason under the applicable law and the relevant facts." (*Id.* at p. 164.)

Pursuant to section 186.22, subdivision (g), a trial court may strike the punishment pertaining to a section 186.22 enhancement. (*People v. Fuentes, supra*, 1 Cal.5th at p. 224.) We review a trial court's ruling on whether to strike the enhancement for abuse of discretion. (Cf. *People v. Gibson* (2016) 2 Cal.App.5th 315, 325; see *People v. Sinclair* (2008) 166 Cal.App.4th 848, 855.)

The burden is on Smith to demonstrate the court misunderstood its sentencing discretion. (Cf. *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523.) Smith has failed to meet that burden. To the contrary, the record affirmatively demonstrates the trial court was aware of its discretion. In January 2017, the court gave the prosecutor notice that Smith would file a *Romero* motion and the court told Smith's counsel to provide with the motion any specific information he wished the court to consider. On August 21, 2017, Smith filed a combined sentencing memorandum and motion to strike the strike and gang enhancement. The motion addressed the court's discretion to strike the strike under *Romero* and to strike the gang enhancement under *Fuentes*. At the August 23, 2017 sentencing hearing, the court stated it had read the "defense sentencing memorandum."

Moreover, before argument from Smith's counsel, the trial court indicated Smith's counsel was asking that Smith's prison sentence be significantly less than 19 years to life. The court also indicated counsel had asked that the court strike the gang allegation and impose a less severe prison sentence. These comments confirm the trial court was aware that the defense had been asking it to exercise its discretion to strike the strike and gang enhancement. The court said nothing that clearly indicated it did not believe it had discretion to strike the prior conviction or the gang enhancement. Where, as here, the record demonstrates on its face that the sentencing court was aware of its discretion to make a sentencing choice, we presume the court's failure to make that choice was an exercise of that discretion. (Cf. *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Smith has failed to

demonstrate that the court erroneously believed it lacked discretion to strike the strike and gang enhancement.

Additionally, when deciding whether to strike a strike, a trial court is presumed to have considered all relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 308-310; see Cal. Rules of Court, rule 4.409.) This presumption also applies to a trial court's discretionary decision to strike a gang enhancement. (Cf. *People v. Myers, supra*, at p. 310.) Smith asserts that it was only because he admitted a gang enhancement allegation as to the offense underlying the strike that that offense became a strike. However, we presume the trial court considered this alleged mitigating factor.¹¹

Smith suggests the punishment imposed was “unduly harsh” and thus an abuse of discretion. He argues that “[w]hile the offense was serious, it was in essence a moot effort. You can’t dissuade someone [from] doing something they already chose not to do.” As discussed above, however, the jury reasonably could have found that Smith intended to dissuade T.R. from testifying at Washington’s trial. From that standpoint, his effort to dissuade T.R. was not moot.

¹¹ Smith notes in passing that the trial court did not mention whether it read or considered the probation officer’s report and its conclusion that Smith’s offense did not appear to warrant a state prison sentence. We presume the court read and considered the probation officer’s report. (*People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7.) In any event, a probation report is advisory only (*People v. Llamas* (1998) 67 Cal.App.4th 35, 40), and the trial court was not bound by it (*People v. Welch* (1993) 5 Cal.4th 228, 234; *People v. Butler* (1988) 202 Cal.App.3d 602, 607-608).

The trial court considered all relevant factors in deciding not to strike his prior conviction or the gang enhancement. Based on Smith's criminal history, the seriousness of his offense, his gang involvement, and the fact he was on probation when he committed the current offense, we cannot and do not say the trial court's ruling was an abuse of discretion or was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377; accord, *People v. McDowell* (2012) 54 Cal.4th 395, 429-430.)

III. Smith Is Entitled to 56 Days of Conduct Credit

The trial court awarded Smith 377 days of custody credit for the time he spent in custody from August 12, 2016, when Officer Rios arrested him, to August 23, 2017, the date of his sentencing hearing, inclusive. There is no dispute that this award was correct. Following that credit award, the court stated without explanation, "I am not going to calculate his good time/work time credit."

Smith claims, and the People concede, he is also entitled to 56 days of presentence conduct credit. Section 2933.1, subdivisions (a) and (c), limit an award of conduct credit under section 4019 to 15 percent of the actual period of confinement where the conviction is of a felony offense listed in section 667.5, subdivision (c). "Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22," are included in section 667.5, subdivision (c)(20). Smith is entitled to 56 days of presentence conduct credit. We will remand to permit the trial court to award that credit.

IV. Remand Is Appropriate Under Senate Bill No. 1393

Smith’s prison sentence included a five-year section 667, subdivision (a) enhancement. In a supplemental brief,¹² Smith claims that, as a result of Senate Bill No. 1393, which became effective this year, we should remand this matter so that the trial court can exercise its discretion as to whether to strike, pursuant to section 1385, subdivision (a), the enhancement. As respondent concedes, the claim is well-founded.

“On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court [was] required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ (§ 667[, subd.] (a)), and the court [had] no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’ (§ 1385[, subd.] (b).)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

In *Garcia*, the “[d]efendant claim[ed] Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final when Senate Bill 1393 becomes effective on

¹² We asked for and received supplemental briefing on the issue of the impact, if any, of Senate Bill No. 1393, on the trial court’s imposition of the section 667, subdivision (a) enhancement.

January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at pp. 971-972.) *Garcia* agreed. (*Id.* at p. 972.) *Garcia* observed that, under the rule of *In re Estrada* (1965) 63 Cal.2d 740, “absent evidence of contrary legislative intent, ‘it is an inevitable inference’ that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective.” (*Garcia, supra*, at p. 972.)

Garcia later stated, “under the *Estrada* rule, as applied in [subsequent cases], it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.) Accordingly, we will remand to permit the trial court to exercise its discretion under section 1385, subdivisions (a) and (c), as to Smith’s section 667, subdivision (a) enhancement. We express no opinion as to how the trial court should exercise that discretion.

V. The Sentencing Minute Order and The Abstract of Judgment Must Be Corrected

The trial court, when orally pronouncing judgment on August 23, 2017, sentenced Smith to prison for 19 years to life, consisting of 14 years to life (seven years to life pursuant to section 186.22, subdivision (b)(4), doubled as a second strike) plus “five years.” The court, by earlier sentencing comments, indicated the “five years” was for the section 667, subdivision (a), prior serious felony conviction enhancement.

However, the August 23, 2017 minute order and the abstract of judgment erroneously state that the court imposed

five years pursuant to section 186.22, subdivision (b)(4). The People contend the sentencing minute order and abstract of judgment must be corrected accordingly. We agree. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3, 482; *People v. Solorzano* (1978) 84 Cal.App.3d 413, 415, 417.)

Moreover, although the trial court, when orally pronouncing judgment, indicated that Smith's prison sentence included, pursuant to section 186.22, subdivision (b)(4), an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence, neither the minute order nor the abstract of judgment reflects this. The People claim the minute order and abstract of judgment must be corrected in this regard as well. We agree.

Finally, the trial court sentenced Smith under section 186.22, subdivision (b)(4). The court did not refer to subparagraph (C) of that subdivision. Line 8 on the abstract of judgment currently reflects only that the court sentenced Smith pursuant to the three strikes law. The People claim that the "other (*specify*)" box should be checked on line 8, and that that line should state that the trial court sentenced Smith pursuant to section 186.22, subdivision (b)(4)(C). We agree the abstract of judgment must be corrected to reflect that the court sentenced Smith pursuant to the three strikes law and section 186.22, subdivision (b)(4).

DISPOSITION

The judgment of conviction is affirmed. Upon remand, the court is directed to award Smith 56 days of conduct credit pursuant to section 4019. The trial court also shall determine

whether to strike the enhancement imposed under section 667, subdivision (a)(1). The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.